



**United States of America
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“Competition Policy: Time for a Reset?”

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Many thanks to Fred Jenny and the OECD for inviting me to speak on this panel. It is an honor to participate in this global dialogue, albeit remotely. Both in the United States and around the world, enforcers and stakeholders are engaging in a lively debate regarding the future of competition enforcement. In the United States, proposals to overhaul the antitrust laws have been spurred by concerns that competition is declining, premised on assertions that concentration in the United States is increasing.¹

More recent analysis has documented significant flaws in the earlier studies that purported to find higher levels of concentration and larger markups.² Of course, the existence of higher margins is not, in and of itself, a sign that competition is lacking. It is important to distinguish between products where consumers have a range of price options and those where they do not. Although some commentators seek to restrict choice,³ product differentiation is a good thing. In some instances, a consumer goods company with a strong brand reputation may be able to obtain a relatively higher margin, while a retailer's store brand will have a lower price point and a lower margin.⁴ Margins differ depending on quality, and quality-adjusted prices matter as well.

In the U.S., we see higher prices and higher margins, without lower-cost alternatives, where regulatory regimes and rent-seeking are prevalent. For example, many states' laws limit entry and expansion in the healthcare services sector, and immunize healthcare providers' cooperation and mergers from antitrust scrutiny.⁵ There is no lower-margin equivalent of the store brand in these markets. Patients and insurers simply have to pay the higher prices that result from reduced output.

I understand the concern that people around the world are losing faith in capitalism. But the real problem is crony capitalism. Capitalism is a system in which the production of

¹ See JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* (2014); COUNCIL OF ECONOMIC ADVISERS, *BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4* (updated May 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf; OPEN MARKETS INSTITUTE, *AMERICA'S CONCENTRATION CRISIS* (2019), <https://concentrationcrisis.openmarketsinstitute.org>.

² See, e.g., Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 *ANTITRUST L.J.* 361, 386 (2018); Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 *J. OF ECON. PERSPECTIVES* 69, 75-76 (2019); Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 *J. OF ECON. PERSPECTIVES* 44, 48 (2019); Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, 33 *ANTITRUST* 74, 74 (2018); Kevin Rinz, *Labor Market Concentration, Earnings Inequality, and Earnings Mobility* (U.S. Census Bureau Working Paper 2018-10), <https://www.census.gov/content/dam/Census/library/working-papers/2018/adrm/carra-wp-2018-10.pdf>; Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity* 13 (Census Working Paper CES-WP18-48, 2018), <https://www.census.gov/library/working-papers/2018/adrm/ces-wp-18-48.html>.

³ See, e.g., Tim Wu, Opinion, *That Flour You Bought Could Foretell Our Economy*, *N.Y. TIMES*, July 27, 2020, at A23 (praising "King Arthur and the regional grain companies [that] manage to sell their product at higher prices than do General Mills and Ardent Mills" and criticizing an economic model of keeping prices low).

⁴ See Robert L. Steiner, *The Nature and Benefits of National Brand/Private Label Competition*, 24 *REVIEW OF INDUSTRIAL ORGANIZATION* 105, 108 (2004) (summarizing the literature to conclude that "[i]n all or virtually all cases the leading national brands in each category had a higher mean retail price than the private labels and the low volume (fringe) national brands").

⁵ See Christine S. Wilson and Pallavi Guniganti, *Deregulating Health Care in a Pandemic – and Beyond*, 34 *ANTITRUST* 14 (2020).

goods and services is based on supply and demand in the market rather than through central planning, and government intervenes only where necessary to address market failures. In contrast, crony capitalism is a system in which lobbyists and other special interests engage in rent-seeking and legislatures create laws that pick winners and losers. In that system, citizens typically lose out to special interests, so they understandably despair.

The FTC has a strong competition advocacy program to address government barriers to competition. The right approach is not to give up hope for antitrust and capitalism, but to clear away the obstacles to free market competition that government has created.⁶ In other words, to restore the faith of the citizenry in our antitrust regime, we need to reject rent-seeking and competition-distorting regulations.

Competition policy best serves consumers and domestic economies when it focuses exclusively on consumer welfare. In the U.S., public interest goals are best addressed by agencies set up specifically to address particular concerns. For example, the mission of the Small Business Administration is to enable the establishment and vitality of small businesses.

That said, public interest mandates for regulators can result in uncertainty for firms and consumers. The U.S. telecommunications sector regulator, the Federal Communications Commission, operates under a public interest mandate first laid out in the 1927 Radio Act.⁷ But Congress left the agency to interpret what that means. Unfortunately, the vagueness of this mandate has led to wild swings in regulatory policy. Sometimes the agency's leadership thinks more regulation will protect and benefit the public; at other times in its history, the FCC has operated on the principle that the public benefits most from market efficiency.⁸ As the composition of the Commission changes, so too does the agency's interpretation of what constitutes the public interest.

For example, under the Obama Administration, Chairman Wheeler in 2015 issued the Open Internet Order, which reflected his view that the public interest is best served by regulations that control how fixed-line broadband providers handle internet traffic. The Open Internet Order prioritized the interests of edge providers – companies such as Google and Netflix. Under the Trump Administration, Chairman Pai reversed his predecessor, saying the Order created “unnecessary regulations that hold back investment and innovation.”⁹

In other words, in just three years, the broadband sector went from relatively little market regulation, to a significant regulatory scheme dictating how to handle internet traffic, and then back to a deregulatory regime. Chairman Pai has spoken about how the changed

⁶ For example, many developing countries have welcomed ride-hailing companies for shaking up sclerotic local taxi markets. *See* Press Release, CADE, CADE analyzes the competitive effects of Uber's entry in the market, especially over taxi apps (Apr. 23, 2018), <http://en.cade.gov.br/cade-analyzes-the-competitive-effects-of-the-uber2019s-entry-in-the-market-especially-over-taxi-apps> (“it would be possible to encourage business models that could foster the competition among apps and hence to benefit the consumers allowing them to choose among services that are more innovative, with improved quality and safety, and lower prices”); COFECE, *Opinión de la COFECE sobre las empresas de redes de transporte* (2015).

⁷ PATRICIA MOLONEY FIGLIOLA, CONG. RSCH. SERV., RL32589, THE FEDERAL COMMUNICATIONS COMMISSION: CURRENT STRUCTURE AND ITS ROLE IN THE CHANGING TELECOMMUNICATIONS LANDSCAPE (2019).

⁸ *Id.*

⁹ *Id.* at 9-11.

incentives are visible in the levels of investment.¹⁰ Broadband network investment dropped more than 5.6% under the Open Internet Order, which was the first time that investment fell during a period of economic growth,¹¹ but rebounded once the order was reversed.

I recognize the impulse among many governments and legislatures, including those in the United States, to promote sectors of their own economies through government measures. But in addition to distorting competition and hurting consumer welfare in the short run, those policies often end up being counterproductive in other ways.¹²

Beyond proposals to revise our analytical standard, questions arise regarding whether we need reforms to address the dynamics of the digital sector both as it exists today and as it will evolve in the future. These questions are not new. Whether competition enforcement tools are inadequate for tech is a question we asked during the *Microsoft* case more than 20 years ago, particularly regarding network effects and tipping markets.¹³ It came up again a few years later at the Antitrust Modernization Commission,¹⁴ and at both times experts found antitrust law enforcement to be capable of addressing the digital sector. I continue to believe the antitrust laws in the US are sufficiently broad and flexible to address even swiftly evolving industries like the tech sector.

As an aside, it has become fashionable to take any new term or concept in antitrust and apply it to the digital sector. For example, the economists who originated the phrase “killer acquisitions” were writing about the pharmaceutical sector and the problem of mergers that did not have to be notified to enforcers, and that resulted in termination of the acquired company or assets.¹⁵ But the term is now being used for billion-dollar deals in the tech sector that leave the acquired company very much alive.¹⁶

The traditional tools of antitrust law itself are not the same as our knowledge of the particular sectors and business practices to which we would apply those tools. To increase our expertise, the FTC nearly two years ago formed the Tech Task Force, which is now the

¹⁰ Ajit Pai, Chairman, Fed. Comm'n Comm'n, Remarks at the ITU's Global Symposium for Regulators (Sept. 1, 2020), <https://docs.fcc.gov/public/attachments/DOC-366589A1.pdf>.

¹¹ See Hal J. Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (2017).

¹² See, e.g., GARY C. HUFBAUER & KIMBERLY A. ELLIOTT, *MEASURING THE COSTS OF PROTECTION IN THE UNITED STATES* (1994) (finding that for each domestic job preserved by protectionist trade measures, consumers paid three times the average manufacturing worker's wage); JOSEPH FRANCOIS AND LAURA M. BAUGHMAN, *THE UNINTENDED CONSEQUENCES OF U.S. STEEL IMPORT TARIFFS: A QUANTIFICATION OF THE IMPACT DURING 2002* (2003) (“More American workers lost their jobs in 2002 to higher steel prices than the total number employed by the U.S. steel industry itself”).

¹³ Joel I. Klein, Assistant Attorney General, U.S. Dep't of Justice Antitrust Division, Remarks Before the New York State Bar Association Antitrust Law Section Program, *The Importance of Antitrust Enforcement in the New Economy*, Address before the New York State Bar Association Antitrust Law Section Program (Jan. 29, 1998) (“the issues raised by antitrust enforcement in high-tech industries are not nearly so new as some may think”).

¹⁴ ANTITRUST MODERNIZATION COMM'N, *REPORT AND RECOMMENDATIONS* 31-46 (2007) (Chapter I.A: Antitrust Law and the “New Economy”).

¹⁵ Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 *J. OF POLITICAL ECONOMY* 649 (2021).

¹⁶ See, e.g., Tristan Lécuyer, *Digital conglomerates and killer acquisitions – A discussion of the competitive effects of start-up acquisitions by digital platforms*, *Concurrences* No. 1, at 42 (2020) (“these acquisitions would be a way for digital platforms to ‘kill’ future competition by acquiring a promising start-up which might challenge their incumbent position at some point in the future.... We refer to this concern as the ‘killer acquisition concern’ in the remainder of the paper”).

agency's Technology Enforcement Division.¹⁷ We are also conducting market studies under our 6(b) power, including of acquisitions by GAFAM that were not previously notified to us.¹⁸

Where antitrust does not provide the appropriate toolbox, legislative changes may be the answer. For example, market failures in consumers' understanding of how their data may be obtained, shared and monetized indicate the need for a comprehensive federal privacy law.¹⁹ And a piece of legislation in the United States known colloquially as "Section 230" has played a significant role in shaping online platforms.²⁰ Amazon cites the law as a defense against litigation over defective products that third parties sell through its marketplace.²¹ Facebook and Google's YouTube avoid legal liability for what users say²² but can attract advertisers by promising to delete or demonetize speech that the advertisers might not want to see next to their ads.²³ We know that when the government intervenes in a market, competitive dynamics change. This phenomenon is no less apparent when government intervention takes the form of an exemption from traditional liability.

To the extent antitrust is tethered to economic analysis, the antitrust laws are flexible enough to take account of the evolving economics. The DOJ and a number of state attorneys general have announced a case against Google.²⁴ News outlets report that the FTC and some

¹⁷ Press Release, U.S. Federal Trade Comm'n, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets: Agency dedicates resources exclusively towards monitoring competition in the tech industry and taking enforcement actions when warranted (Feb. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>.

¹⁸ Press Release, U.S. Federal Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies: Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp. (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

¹⁹ Christine S. Wilson, Commissioner, U.S. Federal Trade Comm'n, Free Markets, Regulation, and Legislation: A Place for Everything, and Everything in Its Place, Remarks at the Free State Foundation Twelfth Annual Telecom Policy Conference (Mar. 10, 2020) (arguing for federal privacy legislation due to, *inter alia*, the information asymmetry between consumers and companies regarding data collection).

²⁰ 47 U.S.C. § 230 (Protection for private blocking and screening of offensive material).

²¹ *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 151-53 (3rd Cir. 2019).

²² *See, e.g.*, Motion to Dismiss at 17, *Prager University v. Google LLC*, 5:17-cv-06064-LHK (Dec. 29, 2017) ("YouTube's choices about ... whether ads should be displayed alongside a given video all fall squarely within the functions protected under Section 230.").

²³ Patrick Coffee, *Brands and Media Agencies Send Google an Ultimatum: Evolve or Else; Advertisers fed up with risks from offensive YouTube content*, ADWEEK (Mar. 24, 2017), <https://www.adweek.com/performance-marketing/brands-and-media-agencies-send-google-an-ultimatum-evolve-or-else/>; Press Release, Chris Harihar, Study: Consumers Reject Brands That Advertise on 'Fake News' and Objectionable Content Online; DoubleVerify and Harris Poll, New Harris Poll and DoubleVerify research reports that consumers hold advertisers accountable for the credibility and accuracy of the content they advertise on (June 17, 2019), <https://doubleverify.com/newsroom/study-consumers-reject-brands-that-advertise-on-fake-news-and-objectionable-content-online>; Rob Rakowitz, World Federal of Advertisers, WFA and platforms make major progress to address harmful content (Sept. 23, 2020), <https://wfanet.org/knowledge/item/2020/09/23/WFA-and-platforms-make-major-progress-to-address-harmful-content> ("Global Alliance for Responsible Media agrees commitments and timeframe for the first global brand safety and sustainability framework for the advertising industry" with Facebook, YouTube and Twitter). Advertisers' sensitivity about content long pre-dates the internet. *See* Federal Communications Commission, Second Interim Report by the Office of Network Study: Television Network Program Procurement Part II, No. 12782, 368-533 (1965) (summarizing the 1961 testimony of business representatives on how they decide to spend advertising dollars on TV programming).

²⁴ Press Release, U.S. Dep't of Justice, Justice Department Sues Monopolist Google For Violating Antitrust Laws; Department Files Complaint Against Google to Restore Competition in Search and Search Advertising Markets (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>.

states are considering an antitrust case against Facebook.²⁵ It seems premature to conclude that the antitrust laws are ill-suited to the task of ensuring competition in the tech sector, given that these cases will be important bellwethers.

We have brought monopolization cases against technology companies that involve network effects. For example, last year the FTC sued the health information company Surescripts for allegedly using illegal vertical and horizontal restraints to maintain its monopolies over multi-sided electronic prescribing markets.²⁶ Network effects – having the user of a good or service derive value based on how many other people are using it – date back at least to the technology of the telegraph. It didn't do you much good to tap out a message if the person you were trying to reach couldn't receive it. And while many digital markets exhibit network effects and while there are points at which tipping may occur, a winner-take-all assumption does not describe most internet platforms.²⁷

The United States has attempted market regulation for industries that were perceived as the infrastructure on which other companies relied. But dictating prices, lines of business and so on for railroads and airlines was a fiasco for consumers.²⁸ I remain confident that competition is the best way to produce the best outcomes for consumers.

If industrial policy is a political imperative, it should be transparent and carried out distinct from competition policy.²⁹ And if governments take steps to promote their industries, it should be done in a competitively neutral way. The OECD has done important work on promoting competitive neutrality. Competition agencies also can play a role by advocating for a level playing field and against industrial policies that distort competition, harm consumers, risk provoking trade retaliation, and (by protecting inefficient firms) ultimately backfire on the domestic economy.

Speaking about the consumer welfare standard and the legal foundations of antitrust law in the U.S. takes us back to Senator John Sherman. The antitrust act that bears his name

²⁵ See, e.g., Diane Bartz and Paresh Dave, *Facebook probe in final stages as FTC, U.S. states prepare lawsuits*, REUTERS (Nov. 9, 2020), <https://www.reuters.com/article/uk-tech-antitrust-facebook-idUKKBN27Z36E>.

²⁶ Press Release, U.S. Federal Trade Comm'n, *FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets: Company used its digital platform to impose anticompetitive vertical and horizontal restraints on commerce, leading to higher prices and reduced consumer choice, agency alleges* (Apr. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription>.

²⁷ See David S. Evans and Richard Schmalensee, *Why Winner-Takes-All Thinking Doesn't Apply to the Platform Economy*, HARVARD BUS. REV. (May 4, 2016), <https://hbr.org/2016/05/why-winner-takes-all-thinking-doesnt-apply-to-silicon-valley>.

²⁸ See Christine S. Wilson & Keith Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, 8 J. OF ANTITRUST ENFORCEMENT. 10 (March 2020), <https://doi.org/10.1093/jaenfo/jnz029>.

²⁹ INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, FINAL REPORT (2000) at 250-51 ("Proposals that vest U.S. trade agencies with the ability (or near ability) to make 'findings' of anticompetitive practices abroad do not solve the real-world problems faced by antitrust enforcers, namely, the requisite gathering of strong evidence to support the claim. Further, these proposals can easily politicize antitrust determinations to the detriment of such a law-based adjudicatory process. The Advisory Committee believes that antitrust agencies are in the best position to evaluate the anticompetitive nature of private restraints and to follow up with either an enforcement action or, if appropriate, a referral to the competition authority in the country where the private restraint exists. Trade agencies, for their part, are better able to assess the trade impact of governmental restraints. This is the allocation of responsibilities under existing law, and it is viewed as fully appropriate by the Advisory Committee.").

prohibits “every contract, combination, or conspiracy in restraint of trade.” He explained in 1890 why the law was written so broadly: “I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case.”³⁰

The courts then spent several decades trying to devise a workable standard to determine what conduct should be illegal under the federal antitrust laws. They couldn’t apply the literal language of the Sherman Act, because banning every contract that restrains trade would lead to banning most contracts.³¹ Based on the common law that pre-dated the Sherman Act, the courts said this new statute must be intended to ban only unreasonable restraints of trade.³²

Economic research found benign explanations for highly concentrated markets, which broke from prior work that was suspicious of concentration.³³ The research raised important arguments undercutting the Structure-Conduct-Performance paradigm that previously had guided antitrust policy and many judicial decisions.³⁴ For example, in *Continental T.V. v. GTE Sylvania*, the Supreme Court in 1977 relied on economic reasoning to hold that nonprice vertical restraints, including the territorial restraints on franchisees at issue in the case, should be evaluated under the rule of reason.³⁵ The Court declared that the rule of reason standard must be based upon demonstrable economic effect.³⁶

Economic analysis is not an end in itself. It is a tool we use to determine what approach will maximize consumer welfare. Economics teaches us that if you force companies to share certain assets with competitors, innovation and investment in such assets will decline. Some proposals may sound fairer in how they would divide the pie, but they will actually result in a smaller pie for people to share.

As indicated by the *Post Danmark* case and the EU’s adoption of the as-efficient-competitor test, the move toward effects-based analysis is by no means unique to the United States.³⁷ Multiple jurisdictions around the world began with inflexible, rule-oriented competition enforcement but evolved toward a less form-based approach. Much of this international harmonization took place because of the hard work done in multilateral organizations like the Competition Committee of the OECD and the International

³⁰ 21 CONG. REC. 2457, 2460 (1890) (statement of Sen. Sherman).

³¹ See *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 327–28 (1897). On how antitrust overcame void for vagueness problems, see *Nash v. United States*, 229 U.S. 373, 376–78 (1913).

³² See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”).

³³ See, e.g., Harold Demsetz, *Two Systems of Belief about Monopoly*, INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164 (Harvey J. Goldschmid et al. eds., 1974); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U.P.A. L. REV. 925, 945 (1979) (summarizing this work in economics).

³⁴ The Structure-Conduct-Performance paradigm claimed that higher industry concentration was correlated with higher prices and profit margins. See generally Joe S. Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing 1936–1940*, 65 Q.J. ECON. 293 (1951). The new economic learning challenged the basis for decisions like *FTC v. Procter & Gamble*, 386 U.S. 568, 575 (1967) (upholding the Commission’s decision against Procter’s acquisition of Clorox on the grounds that Procter’s “huge assets and advertising advantages . . . would dissuade new entrants and discourage active competition from the firms already in the industry due to fear of retaliation by Procter”).

³⁵ 433 U.S. 36, 54–57 (1977).

³⁶ *Id.* at 58–59.

³⁷ Judgment of the Court (Grand Chamber), *Post Danmark A/S v. Konkurrencerådet* (March 27, 2012); Judgment of the Court (Grand Chamber), *Intel v. Commission* (Sept. 6, 2017).

Competition Network. But even as the world has evolved toward competition enforcement based on economic analysis of effects, the bipartisan consensus on antitrust in the U.S. may now be ending.

The report issued in October by the staff of the House Antitrust Subcommittee provides a helpful roundup of many suggestions being made in the current debate.³⁸ Some of the report's proposals would replace sophisticated economic analysis with bright line rules³⁹ – embracing the outdated Structure-Conduct-Performance paradigm – and replace the consumer welfare standard with a public interest standard.⁴⁰ This approach would require enforcers to engage in an almost unavoidably political calculus of whose interests to serve.

If we inject additional goals into the antitrust analysis, we greatly increase subjectivity and uncertainty. The consumer welfare standard, tethered to economic principles, provides predictability to market actors, administrability to courts, and credibility to the decisions made by competition enforcers. The consumer welfare test is a straightforward one. If consumers are harmed by reduced output, decreased product quality or innovation, or higher prices resulting from the exercise of market power, then this result trumps any amount of offsetting gains to producers or others. In this sense, the consumer welfare test is easy to administer on a case-by-case basis.

Contrast this approach with a standard that adds even a single additional goal, such as sustainability. Take, for example, a trade association of cattle producers that requires its members to agree to raise fewer cattle to reduce their methane output. In deciding whether this conduct violates the antitrust laws, the antitrust enforcer must weigh the higher prices paid by consumers against the lower quantity of greenhouse gases now produced by the industry. Which is more important? This choice is not an appropriate decision for an antitrust agency to make; it is a policy decision that should be made by a legislator or regulator. In the U.S., the Environmental Protection Agency has a vast apparatus to determine whether a given regulation's environmental benefits outweigh the costs to business, which are generally passed on to consumers. The antitrust agencies lack this expertise and trying to turn them into experts will put them in conflict with the appropriate regulator.

Although I am not advocating a total welfare standard today, I would like to observe certain characteristics of that standard.⁴¹ In brief, it would enhance sustainability by ensuring that all resources go to their highest valued use, which enables consumers to maintain their standard of living but reduce their consumption of resources. In contrast with the consumer welfare standard that maximizes consumer surplus, a total welfare standard would maximize the size of the entire pie. Some commentators, including Professors Joseph

³⁸ See H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

³⁹ *Id.* at 393.

⁴⁰ *Id.* at 388.

⁴¹ See also Christine S. Wilson, Commissioner, U.S. Federal Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf; Christine S. Wilson, Thomas J. Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 GEO. MASON. L. REV. 1435 (2019).

Farrell and Michael Katz,⁴² have suggested that competition enforcers are best equipped to maximize total surplus, leaving others to decide how best to distribute it. And like the consumer welfare standard, the total welfare standard scores well on the goals of administrability, predictability and credibility of enforcement decisions.

However, the total welfare standard may not be as successful as the consumer welfare standard in driving international convergence in competition law, particularly in merger control. The goals of lower prices, more output, higher quality and greater innovation have tended to benefit consumers across borders. But imagine that in a merger of two foreign-owned firms, the harm would fall upon domestic consumers, while the cost savings for the firms would happen outside one's own country. We see this in the Canadian application of the total welfare standard, as the Competition Bureau's Merger Enforcement Guidelines explicitly exclude "gains that are achieved outside Canada."⁴³ Former Director of Economics at the Competition Bureau, Margaret Sanderson, suggests that blocking an anticompetitive merger between two Canadian subsidiaries of U.S. corporations, but allowing an equivalent deal between two Canadian corporations in light of the efficiencies, may violate Canada's trade agreements.⁴⁴

A public interest test is even more problematic than total welfare for competition enforcers' cooperation and convergence across borders in merger review. As proposed by the House Antitrust Subcommittee, "any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion."⁴⁵ The concept of "the public interest" typically goes beyond just cost savings to firms and the consequences of a merger for consumers. For example, the Subcommittee report asserts that antitrust laws are designed to protect "workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals."⁴⁶

I do agree with some of the House Antitrust Subcommittee report's recommendations. It would be helpful for the FTC to publish more written explanations for its decisions both to take and to abstain from taking action. Retrospectives should be conducted more frequently, as the FTC is now aiming to do with its new merger retrospective initiative.⁴⁷ And I agree that the budgets of the FTC and DOJ should be increased to keep up with the size of the economy we are policing. We are now litigating a record number of matters, and any lawsuit against a large company pits the government against much heftier

⁴² Joseph Farrell & Michael L. Katz, *THE ECONOMICS OF WELFARE STANDARDS IN ANTITRUST*, UC BERKELEY: COMPETITION POLICY CENTER 10-11 (2006), <https://escholarship.org/uc/item/1tw2d426> (edited version of paper appeared in *Competition Policy International* (Oct. 2006)).

⁴³ See COMPETITION BUREAU CANADA, *MERGER ENFORCEMENT GUIDELINES* 42–43 (2011), [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/\\$FILE/cb-meg-2011-e.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf).

⁴⁴ Margaret Sanderson, *Efficiency Analysis in Canadian Merger Cases*, 65 *ANTITRUST L. J.* 623, 627 (1997).

⁴⁵ See H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW, 116TH CONG., *INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS* (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

⁴⁶ H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW, 116TH CONG., *INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS* 392 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

⁴⁷ Press Release, U.S. Federal Trade Comm'n, *FTC's Bureau of Economics to Expand Merger Retrospective Program* (Sept. 17, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/ftcs-bureau-economics-expand-merger-retrospective-program>.

resources than we can command.⁴⁸ I hope that much like the discussions in fora like the OECD, which focus on what competition authorities have in common, the debate over changing U.S. antitrust laws can begin with these points of agreement.

Thanks again to Fred Jenny and the OECD for including me in this panel, and I look forward to the rest of this year's 2020 Global Forum on Competition.

⁴⁸ Ian R. Conner, *A Fiscal Year Like No Other*, COMPETITION MATTERS (Oct 6, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/10/fiscal-year-no-other> (“The Bureau sustained that pace and ultimately saw twenty-eight merger enforcement actions this fiscal year: seven complaints voted out by the Commission, ten settlements accepted for public comment, and eleven transactions abandoned or restructured. This is the highest number since FY2001.”).